**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| Application of AT&T, Corp. and | ) | |
| Teleport Communications Group, Inc. | ) | CC Docket No. 98-24 |
| for Transfer of Control | ) | |

To: The Commission

## MOTION TO DISMISS

BellSouth Corporation submits this Motion to Dismiss the above-captioned application of AT&T Corp. ("AT&T") and Teleport Communications Group., Inc. ("Teleport"). AT&T and Teleport have filed an "application" for Commission approval of their $11.3 billion deal that delivers a backhanded slap to the public interest standard in the Communications Act. The entire public interest showing occupies a page and a half. That page and a half of platitudes does not even begin to meet the requirements that the application provide the basis for informed public comment and Commission evaluation. Chairman Kennard recently noted "the growing body of evidence that suggests that the nation's long distance companies are raising rates when their costs of providing service are decreasing." As interexchange carriers continue to engage in doubtful pricing practices to the particular harm of residential consumers, a careful examination of this acquisition, which, among other things, involves two competing

interexchange carriers (a fact the application's public interest section ignores), is essential.

The application fails to meet the Commission's standards and could not possibly carry the burden of proof that the applicants must meet to demonstrate that this proposed acquisition is in the public interest. The application should therefore be dismissed, without prejudice to the refilling of a proper application.

## I. THE PUBLIC INTEREST STANDARD FOR FCC MERGER REVIEW REQUIRES A SUBSTANTIVE APPLICATION FROM AT&T AND TELEPORT

Approval of the application requires a Commission finding that the proposed acquisition will be in the "public interest."[1] Applicants bear the burden of proving that granting their applications will benefit the public interest.

> [Applicants] must demonstrate not only the efficiency benefits of the merger, but how the merger would enhance or not retard competition. Failure to carry the burden of proof means the Commission must deny the applications or designate them for hearing.

Memorandum Opinion and Order, *Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10 (rel. Aug. 14, 1997) (*Bell Atlantic/NYNEX Order*) at ¶ 36.

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[1] *See, e.g.*, 47 U.S.C. § 214, 309(e)(1997).

The Commission interprets the "public interest" standard "to secure for the public the broad aims of the Communications Act."[2] In recent directly applicable merger cases, the Commission has clarified that the public interest examination includes whether the transaction furthers Commission policies encouraging competition, as well as its effects on preserving and enhancing universal service and accelerating private sector deployment of advanced telecommunications and information technologies and services.[3] The Commission has taken the position that an acquisition must "enhance competition" for it to be in the public interest.[4] When analyzing potential competitive effects,

> Commission analysis of the effect of the transfer on competition is informed by antitrust principles, but not limited by the antitrust laws. The public interest standard, and the competitive analysis conducted thereunder, are necessarily broader than the standard applied to ascertain violations of the antitrust laws.

*Bell Atlantic/NYNEX Order* at ¶ 32. Parties seeking to justify an acquisition because it creates efficiencies must demonstrate that those efficiencies are created by and attainable

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2 *Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States,* 87 F. Supp. 324, 335 (D.D.C. 1949), *aff'd*, 338 U.S. 864 (1949).

3 *Bell Atlantic/NYNEX Order* at ¶ 2; MCI Communications Corp. and British Telecommunications plc, Memorandum Opinion and Order, GN Dkt. No. 96-245, FCC 97-302 (rel. September 24, 1997)("*BT/MCI Order*"); Pittencrief Communications, Inc and Nextel Communications, Include, Memorandum Opinion and Order, CWD No. 97-22, DA 97-2260 at ¶ (rel. Oct. 24, 1997).

4 *Bell Atlantic/NYNEX Order* at ¶ 2.

only through the proposed acquisition.[5] They must also quantify those merger-specific savings and demonstrate that they outweigh any potential anticompetitive harm.[6]

In order to evaluate whether granting an application is in the public interest, applicants must provide factual information sufficient to carry their burden of proof on the issues above. In recent merger proceedings, the Commission made very clear that applications must provide, at a minimum, detailed information regarding the product and geographic markets involved, the identity of competitors, any efficiencies involved, and the proposed acquisition's affects on competition and the public.[7]

## II. THE AT&T - TELEPORT APPLICATION CANNOT BE TAKEN AS A SUBSTANTIVE APPLICATION, DOES NOT MAKE EVEN A GOOD-FAITH ATTEMPT TO MEET THE COMMISSION'S STANDARDS, AND SHOULD BE DISMISSED

The application filed in this proceeding meets none of the Commission's requirements. It provides no facts at all. The entire public interest section is a page and a half. AT&T and Teleport spend that page and a half on a bald assertion that the acquisition "holds great promise" for facilities-based competition for business customers. The applicants assert that the acquisition could even help residential customers in the future because AT&T can "tap the experience and expertise of TCG's management

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5 *Bell Atlantic/NYNEX Order* at ¶ 158.

6 *Bell Atlantic/NYNEX Order* at ¶ 158.

7 See *BellAtlantic/NYNEX Order; BT/MCI Order;* Pacific Telesis Group and SBC Communications, Inc., Memorandum Opinion and Order, Rpt. No. LB 96-32, FCC 97-28 (rel. Jan 31, 1997).

team," which has focused solely on business customers for years, "to lead AT&T's overall local entry strategy for business and residence customers." Application at 7-8. Details and facts are totally absent. So is an explanation of why AT&T cannot hire a local entry management team without an acquisition.[8]

The application contains no real description of markets involved, who competes in particular markets and no attempt to quantify any efficiency or consumer benefit involved. The practical danger of accepting such deficient applications can be easily illustrated with this particular application -- despite the complete absence of discussion in the public interest section, AT&T and Teleport are direct horizontal competitors in some markets.

At the time the application was filed, Teleport was acquiring two facilities-based long distance and international telecommunications providers, ACC Corp and US Wats, Inc.[9] The Merger Agreement between AT&T and Teleport explicitly included ACC

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[8] Illustrating AT&T's and Teleport's cavalier approach to the whole process, the application's conclusion asserts that the acquisition should be approved solely because it will promote competition in the international market. Thus, while the public interest section of the application is devoted solely to the local exchange, the conclusion mentions only international concerns; and never the twain shall meet. (Elsewhere, the application devotes one sentence to international benefits, asserting without a single piece of supporting evidence that combining AT&T and Teleport will "enhance their collective ability to provide international telecommunications services to consumers." Application at 2-3. That sentence includes the rather incredible assertion that AT&T will benefit from combining Teleport's "financial resources" with its own. Application at 2.

[9] ACC Corp. is a switch-based provider of long distance and international telecommunications services. It owns seven long distance switches and one local switch. ACC competes by undercutting the prices of AT&T and the other major carriers. ACC Corp. 10-K, filed March 27, 1997 at 2,8.

Corp. and US Wats in AT&T's acquisition of Teleport.[10] Thus, it was AT&T's intent to acquire these competing long distance carriers as part of its acquisition of Teleport at the time AT&T filed this application. Yet, the application provides no substantive discussion of this fact. In addition, both AT&T and Teleport control substantial wireless spectrum in overlapping geographies, a fact warranting some discussion.[11] Also absent from the application is any mention of the Internet and the fact that Teleport is a substantial Internet backbone provider.[12]

Further, the "benefits" of this proposed acquisition must be spelled out to show that the proposed acquisition will enhance competition and otherwise meet the public interest test. It cannot simply be accepted on faith that AT&T's acquisition of the largest competitive local exchange carrier is in the public interest. Especially when that CLEC is focused exclusively on serving businesses. The application must spell out how the proposed acquisition will affect business and residential consumers of telecommunications services, including its effect on universal service. In discussing the

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[10] Agreement and Plan of Merger among AT&T Corp., TA Merger Corp. and Teleport Communications Group Inc., dated as of January 8, 1998 at §§ 7.1(o), 8.2(j). *See* also Telecommunications Reports, January 12, 1998 at p.5 quoting AT&T Senior Executive VP and Chief Financial Officer Daniel E. Somers. Teleport's deal with US Wats has since been terminated.

[11] Teleport owns BizTel, which controls 38 GHz licenses covering over 150 top U.S. markets. See Teleport Communications Group To Acquire Remaining 50.1 Percent of BizTel Communications Which Provides 38 GHz Wireless Services In 48 States. TCG Press Release at http://www.tcg.com/tcg/media/ PRarchives/BizTel.html.

[12] Teleport owns CERFNET, a Tier One backbone provider. See TCG To Acquire CERFNET Services: Creates New Nationwide Leader In Premier Internet And Telecommunications Services For Business, TCG Press Release at http://www.tcg.com/tcg/media/PRarchives/CERFnet.html, released Jan. 13, 1997.

"benefits" of the proposed acquisition, the application must follow the Commission's stricture that only efficiencies that are created by and attainable through the proposed merger are cognizable.

Others take the Commission's guidance concerning merger applications seriously. For example, SBC's recent application concerning its proposed acquisition of SNET provides a serious and substantive discussion of the public interest.[13] That application involves two carriers that have no horizontal overlaps, whose principal markets are separated by thousands of miles, and who have no vertical relationships. Yet, the application's public interest discussion is long and detailed, and includes facts concerning the markets and competitors involved. Accepting this AT&T - Teleport application, in the face of other detailed applications and the Commission's view of the burden of proof in assessing the identical public interest in section 271 proceedings would create a double standard.[14]

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[13] *Application of Southern New England Telecommunications Corporation and SBC Communications Inc. for Authority, Pursuant to Part 22 of the Commission's Rules, to Transfer Control of Licenses Controlled by Southern New England Telecommunications Corporation*, CC Dkt. No. 98-25, dated Feb. 20, 1998.

[14] The recent application filed concerning WorldCom's proposed acquisition of MCI raised similar issues. See GTE Motion To Dismiss, *Applications of WorldCom, Inc. and Howard A. White, Trustee for Transfers of Control of MCI Communications Corporation and Request for Special Temporary Authority* Dkt No. 97-211 (dated October 1, 1997)("*WorldCom/MCI Application*"). The Commission was forced to provide for an additional comment cycle to address the deficiencies in that filing. Order, *WorldCom/MCI Application*, released Feb. 27, 1998. Although deficient, the WorldCom-MCI application was more substantive than the current AT&T-Teleport one. To allow the AT&T-Teleport application to stand would send a clear message that ignoring the Commission's public interest requirements, at least outside the section 271 context, is acceptable.

## III. CONCLUSION

This application brushes off the public interest. It fails to provide the most basic information required to evaluate the public interest and competitive ramifications of this proposed transaction. Devoting a page and a half to the public interest in an $11.3 billion deal combining companies that are horizontal competitors in some markets, potential competitors in others, and that have overlapping vertical relationships defies the Commission's standards and the public interest in informed decision-making. The application must be dismissed immediately, without prejudice to the refilling of an application that meets the Commission's announced standards.

Respectfully submitted,

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Dated: March 18, 1998

## CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of March, 1998 served the following parties to this action with a copy of the foregoing MOTION TO DISMISS by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties at the addresses listed below:

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